

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 0416

SPEEDWAY SUPERAMERICA, L.L.C.

VERSUS

STATE OF LOUISIANA THROUGH THE LOUISIANA GAMING CONTROL BOARD, STATE OF LOUISIANA THROUGH THE DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS; LOUISIANA STATE POLICE/GAMING LICENSING SECTION

Judgment Rendered: SEP 29 2009

*PMc
by [signature]*

On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket No. 573,039

*EGG
by [signature]*

Honorable Janice Clark, Judge Presiding

Thomas J. Cortazzo
New Orleans, Louisiana
and
Christopher G. Young
Baton Rouge, Louisiana

Counsel for Plaintiff/Appellee
Speedway Superamerica, L.L.C.

Danielle A. Boudreaux
Karen L. Godwin
Katie D. Chabert
Baton Rouge, Louisiana

Counsel for Defendant/Appellant
State of Louisiana Gaming Control Board, State of Louisiana through the Department of Public Safety and Corrections, and the Louisiana State Police/Gaming Licensing Section

BEFORE: DOWNING, GAIDRY AND McCLENDON, JJ.

Downing, J. concurs

McCLENDON, J.

The Louisiana Gaming Control Board (Board) appeals the district court's judgment on judicial review, which reversed the Board's decision to remand to the hearing officer for consideration of the merits the motion of the State of Louisiana, Office of State Police, Gaming Enforcement Division (LSP) to annul a previous judgment ordering the issuance of a video gaming license in favor of Speedway SuperAmerica LLC (SSA). For the reasons that follow, we vacate the district court's judgment and dismiss this appeal.

FACTUAL AND PROCEDURAL HISTORY

In October 1999, SSA filed its original application for a video gaming license with the Board, for a video poker truck stop in Sulphur, Louisiana. Following an investigation, the LSP recommended to the Board that the license be denied, and recommendations of denial were issued by Board on June 20, 2005, January 10, 2007, and May 24, 2007. Thereafter, SSA timely requested an administrative hearing on the recommendations, which took place before the hearing officer over an eight day period.¹ On January 9, 2008, the hearing officer rendered a written decision, concluding that the Board's objections had been addressed and ordering the Board to issue the license. The January 2008 decision was not appealed.

On September 11, 2008, SSA filed for a petition for a writ of mandamus in the 19th Judicial District Court seeking an order that the Board comply with the January 2008 decision of the hearing officer and issue the video poker license. The district court ordered that the writ issue and the Board appealed that decision.²

Meanwhile, on September 18, 2008, the LSP filed a motion to annul the January 2008 decision of the hearing officer, contending that the hearing officer exceeded his statutory authority in ordering the Board to issue the license to

¹ The dates of the hearing were August 28, 29, 30, and 31 and September 7, 17, 24, and 26, 2007.

² That appeal was recently dismissed on joint motion of the parties.

SSA. On September 19, 2008, the hearing officer summarily denied the motion, noting, "This case is currently before the 19th Judicial District Court on Writ of Mandamus filed September 11, 2008. As such, this Hearing Officer has no jurisdiction." Thereafter, on October 17, 2008, the LSP appealed to the Board the hearing officer's decision, and the appeal came for hearing on November 18, 2008, at which time the Board remanded the matter to the hearing officer "to rule on the merits of the motion to declare the Hearing Officer's judgment of January 9, 2008 null and void. The filing of the mandamus suit in the 19th JDC did not automatically divest the Hearing Office of jurisdiction to entertain an action in nullity." SSA did not seek a stay of the Board's decision to remand.

On November 26, 2008, in response to the remand decision of the Board, SSA filed a petition for appeal with the 19th Judicial District Court. Thereafter, the Board filed a motion to dismiss the appeal for lack of jurisdiction, a motion to strike, and an opposition to the petition for appeal. After filing the administrative record in the district court, the Board also filed a motion to correct the record.³ The originally scheduled hearing was reassigned to January 9, 2009, at which time, after argument, the district court denied the motions and then took up the petition for appeal. Following further argument, the district court granted Speedway's appeal and reversed the remand decision of the Board. The judgment was signed on January 15, 2009, and it is from this judgment that the Board appeals.

In this appeal, the Board assigns the following as error:

- A. The district court erred by failing to dismiss SSA's appeal for lack of jurisdiction.
- B. The district court erred by considering evidence outside the record as established before the Board in making its decision on judicial review.
- C. The district court erred by failing to limit the scope and apply the appropriate standard on judicial review.

³ Pursuant to an order of the court, in response to a motion by SSA to require the Board to submit the administrative record herein, the administrative record was filed with the district court on January 5, 2009, and included all administrative proceedings until that date. In its Motion to Correct and/or Designate the Record on Appeal, the Board sought to limit the district court's review of the administrative record to only that which occurred prior to the Board's November 18, 2008 decision to remand, which is the judgment on appeal herein.

D. The district court erred in reversing the board's decision on judicial review because SSA's filing of a mandamus action in the district court did not divest the hearing officer or the Board of jurisdiction over the pending motion to annul.

DISCUSSION

The Louisiana Gaming Control Law, LSA-R.S. 27:1, *et seq.*, establishes the Louisiana Gaming Control Board, which "shall regulate all gaming activities and operations in the state." LSA-R.S. 27:15A. Additionally, the Board shall "[h]ave all regulatory authority, control, and jurisdiction, including investigation, licensing, and enforcement, and all power incidental or necessary to such regulatory authority, control, and jurisdiction over all aspects of gaming activities and operations as authorized pursuant to the provisions of the Louisiana Economic Development and Gaming Corporation Act." LSA-R.S. 27:15B(1). The Louisiana Gaming Control Law also provides that appeals from any decision of the board shall be filed in the Nineteenth Judicial District Court and shall be reviewed solely on the record. LSA-R.S. 27:26; **Metro Riverboat Associates, Inc. v. Louisiana Gaming Control Bd.**, 01-0185, pp. 4-5 (La. 10/16/01), 797 So.2d 656, 659.

The Louisiana Administrative Procedure Act (LAPA) sets forth procedures to be followed by state administrative agencies, boards, and other entities, including the Louisiana Gaming Control Board. LSA-R.S. 49:951(2); **Metro Riverboat Associates, Inc.**, 01-0185 at p. 9, 797 So.2d at 662. The LAPA was not intended to supersede the more specific provisions of other administrative acts, such as the Louisiana Gaming Control Law. Rather, it was intended to create procedures in those instances where none exist. **Id.** The Louisiana Gaming Control Law itself states that hearings and appeals from decisions of the board should be handled in accordance with the provisions of the LAPA. **Id.**; LSA-R.S. 27:25B.

Pursuant to the LAPA, the district court may affirm the decision of the agency or remand for further proceedings, or reverse or modify the decision if substantial rights of the appellant have been prejudiced. LSA-R.S. 49:964G.

Additionally, an aggrieved party may obtain a review of any final judgment of the district court by appeal to the appropriate circuit court of appeal. LSA-R.S. 49:965.

The question is whether the November 18, 2008 remand decision is a “final” one for purposes of an appeal. The Board asserts that the remand was not a final decision as the actual merits of the motion to annul were never considered, and therefore the district court did not have appellate jurisdiction to consider SSA’s appeal. SSA urges, however, that the Board’s decision is appealable, especially since it was the Board that advised SSA that it had ten days to appeal to the 19th Judicial District Court. SSA further contends that once it appealed, any further administrative proceedings were improper and without effect. We agree that the Board’s decision of November 18, 2008, was an interlocutory one since it did not address the merits of the motion to annul and was simply an order to remand to consider the merits.⁴

Thus, although generally not appealable, LSA-R.S. 49:964A(1) authorizes immediate review of a “preliminary, procedural, or intermediate agency action or ruling” if “review of the final agency decision would not provide an adequate remedy and inflict irreparable injury.” SSA maintains that requiring it to wait for review of the Board’s remand decision until some indefinite time in the future would not provide it an adequate remedy and would inflict irreparable injury. Based on the limited and specific facts of this case, we agree.

Pursuant to LSA-C.C.P. art. 2164, an appellate court must render a judgment which is just, legal and proper upon the record on appeal. In this matter, the entire administrative record through January 5, 2008, was

⁴ Louisiana Code of Civil Procedure article 1841 provides:

A judgment is the determination of the rights of the parties in an action and may award any relief to which the parties are entitled. It may be interlocutory or final.

A judgment that does not determine the merits but only preliminary matters in the course of the action is an interlocutory judgment.

A judgment that determines the merits in whole or in part is a final judgment.

submitted and made part of the record on appeal. Looking at the record before us, the administrative proceeding continued while judicial review was being sought in the 19th Judicial District Court. The filing of the petition in the district court seeking judicial review of an administrative adjudication does not of itself stay enforcement of the administrative order. Such a stay is not a matter of right. LSA-R.S. 49:964C⁵; **Summers v. Sutton**, 428 So.2d 1121, 1125 (La.App. 1 Cir. 1983). The record shows that after SSA appealed following the Board's remand, SSA did not seek a stay of the administrative proceedings until January 26, 2009, by which time the hearing officer had already considered the merits of the motion to annul the January 2008 judgment.

Thus, while SSA's appeal of the remand decision was pending, the administrative matter moved forward. On December 10, 2008, the hearing officer held a hearing to consider the merits of the motion to annul the January 2008 judgment, in accordance with the Board's remand order. During the hearing, the hearing officer stated that he was "annulling [the January 9, 2008] judgment on the grounds that I didn't have subject matter jurisdiction to order the gaming board to issue that license," and "The judgment of January the 9th, 2008, is annulled for the reasons I have given you." The order he issued stated, as follows:

At the December 10, 2008 [hearing], your Hearing Officer agreed that he had no authority to "ORDER" the Louisiana Gaming Control Board to issue a Type V Video Gaming License to Speedway SuperAmerica, L.L.C.; therefore, the Order of January 9, 2008 is amended to read:

HAVING FOUND [Speedway] SuperAmerica, L.L.C. suitable, it is recommended that the Louisiana Gaming Control Board issue a Type V Video Gaming License to Speedway SuperAmerica, L.L.C.

⁵ Louisiana Revised Statute 49:964C provides:

The filing of the petition does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay *ex parte* upon appropriate terms, except as otherwise provided by Title 37 of the Louisiana Revised Statutes of 1950, relative to professions and occupations. The court may require that the stay be granted in accordance with the local rules of the reviewing court pertaining to injunctive relief and the issuance of temporary restraining orders.

Thus, on December 10, 2008, the hearing officer rendered a decision in this matter pursuant to the Board's order of remand.

Jurisdiction is the legal power and authority of a court to hear and determine an action of the parties and to grant the relief to which they are entitled. LSA-C.C.P. art. 1; **Boudreaux v. State, Department of Transportation and Development**, 01-1329, p. 7 (La. 2/26/02), 815 So.2d 7, 12. Subject matter jurisdiction is the legal power and authority of a court to hear and determine a particular class of actions or proceedings, based upon the object of the demand, the amount in dispute or the value of the right asserted. LSA-C.C.P. art. 2; **Boudreaux**, 01-1329 at p. 7, 815 So.2d at 12. The issue of subject matter jurisdiction addresses the court's authority to adjudicate the cause before it. The issue may be raised at any time and at any stage of an action. **McPherson v. Foster**, 03-2696, p. 8 (La.App. 1 Cir. 10/29/04), 889 So.2d 282, 288. A judgment rendered by a court which has no jurisdiction over the subject matter of the action or proceeding is void. LSA-C.C.P. art. 3.

Accordingly, before addressing the Board's assignments of error, we must determine, as a threshold issue, whether subsequent action in this administrative proceeding has rendered this appeal moot, thereby depriving this court of subject matter jurisdiction.

It is well settled that courts will not decide abstract, hypothetical or moot controversies or render advisory opinions with respect to such controversies. **Cat's Meow, Inc. v. City of New Orleans Through Dept. of Finance**, 98-601, p. 8 (La. 10/20/98), 720 So.2d 1186, 1193. Courts require that cases submitted for adjudication be justiciable, ripe for decision, and not brought prematurely. **St. Charles Parish Sch. Bd. v. GAF Corp.**, 512 So.2d 1165, 1171 (La. 1987).

A "justiciable controversy" connotes, in the present sense, an existing actual and substantial dispute, as distinguished from one that is merely hypothetical or abstract, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon which the judgment of the

court may effectively operate through a decree of a conclusive character.

Abbott v. Parker, 259 La. 279, 308, 249 So.2d 908, 918 (1971).

According to Louisiana jurisprudence, an issue is "moot" when a judgment or decree on that issue has been deprived of practical significance or made abstract or purely academic. A case is "moot" when a rendered judgment or decree can serve no useful purpose and give no practical relief or effect. If the case is moot, then there is no subject matter on which the judgment of the court can operate. That is, jurisdiction, once established, may abate if the case becomes moot. **Cat's Meow, Inc.**, 98-601, p. 8 , 720 So.2d at 1193; **First Nat. Bank of Picayune v. Pearl River Fabricators, Inc.**, 06-2195, p. 7 (La. 11/16/07), 971 So.2d 302, 307-08.

This case can be analogized to one where an appeal is taken from an order denying injunctive relief and the act sought to be enjoined is accomplished pending the appeal. See **In re Natural Resources Recovery, Inc.**, 98-2917, pp. 5-6 (La.App. 1 Cir. 2/18/00), 752 So.2d 369, 372, writs denied, 00-0806 (La. 5/26/00), 762 So.2d 1104, and 00-0836 (La. 5/26/00), 762 So.2d 1105; **City of New Orleans, Department of Public Safety and Permits v. Board of Commissioners of Orleans Levee District**, 96-0535, p. 3 (La.App. 4 Cir. 9/26/96), 694 So.2d 975, 977, writ denied, 96-2820 (La. 1/6/97), 685 So.2d 116. In such an instance, injunctive relief is no longer available to the appellant, as a court cannot enjoin a fait accompli, and the appeal will be dismissed as moot. See **In re Natural Resources Recovery, Inc.**, 98-2917 at p. 6, 752 So.2d 369, 373. Similarly, by this appeal, SSA sought to reverse the November 18, 2008 decision of the hearing officer remanding the motion to annul to the hearing officer and to reinstate the hearing officer's September 19, 2008 denial of the motion to annul. However, because there was no stay of the administrative proceedings pending the appeal, the remand occurred, and the hearing officer rendered a new judgment. Accordingly, there is no judgment to reinstate.

Thus, considering the entire administrative record before us, at the time the district court rendered its judgment on January 15, 2009, there was no longer an actual, immediate controversy between the parties. The matter had already been remanded and the hearing officer had issued a new decision on December 10, 2008, replacing its decision of January 9, 2008. No justiciable controversy existed after December 10, 2008, and the district court's judgment is void for lack of subject matter jurisdiction. See LSA-C.C.P. art. 3; **El Chico Restaurants of Louisiana, Inc. v. Louisiana Gaming Control Bd.**, 01-0205, p. 7 (La.App. 1 Cir. 12/20/02), 837 So.2d 641, 646. Accordingly, the district court's judgment must be vacated. Because the district court's judgment was void for lack jurisdiction, this court has nothing to review and the appeal must be dismissed.

CONCLUSION

For the reasons set forth herein, the judgment of the district court is vacated for lack of jurisdiction, and this appeal is dismissed. The costs of this appeal are assessed to Speedway SuperAmerica LLC.

JUDGMENT VACATED; APPEAL DISMISSED.